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# In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 66

ANGHEL GOLDSTEIN, aka Andrei Pietraru,
IULIU NASTA, aka Julius Nasta and
GHEORGHE FUNDI,
on behalf of themselves and all others similarly situated,
*Appellants,*

vs.

JOSEPH A. COX and SAMUEL DiFALCO,
Surrogates of the County of New York,

EDWARD F. SILVER,
Surrogate of the County of Kings,

CHRISTOPHER C. McGRATH,
Surrogate of the County of Bronx,

JOHN T. CLANCY,
Surrogate of the County of Queens,

ARTHUR LEVITT,
State Comptroller,
*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

## BRIEF OF APPELLANTS.

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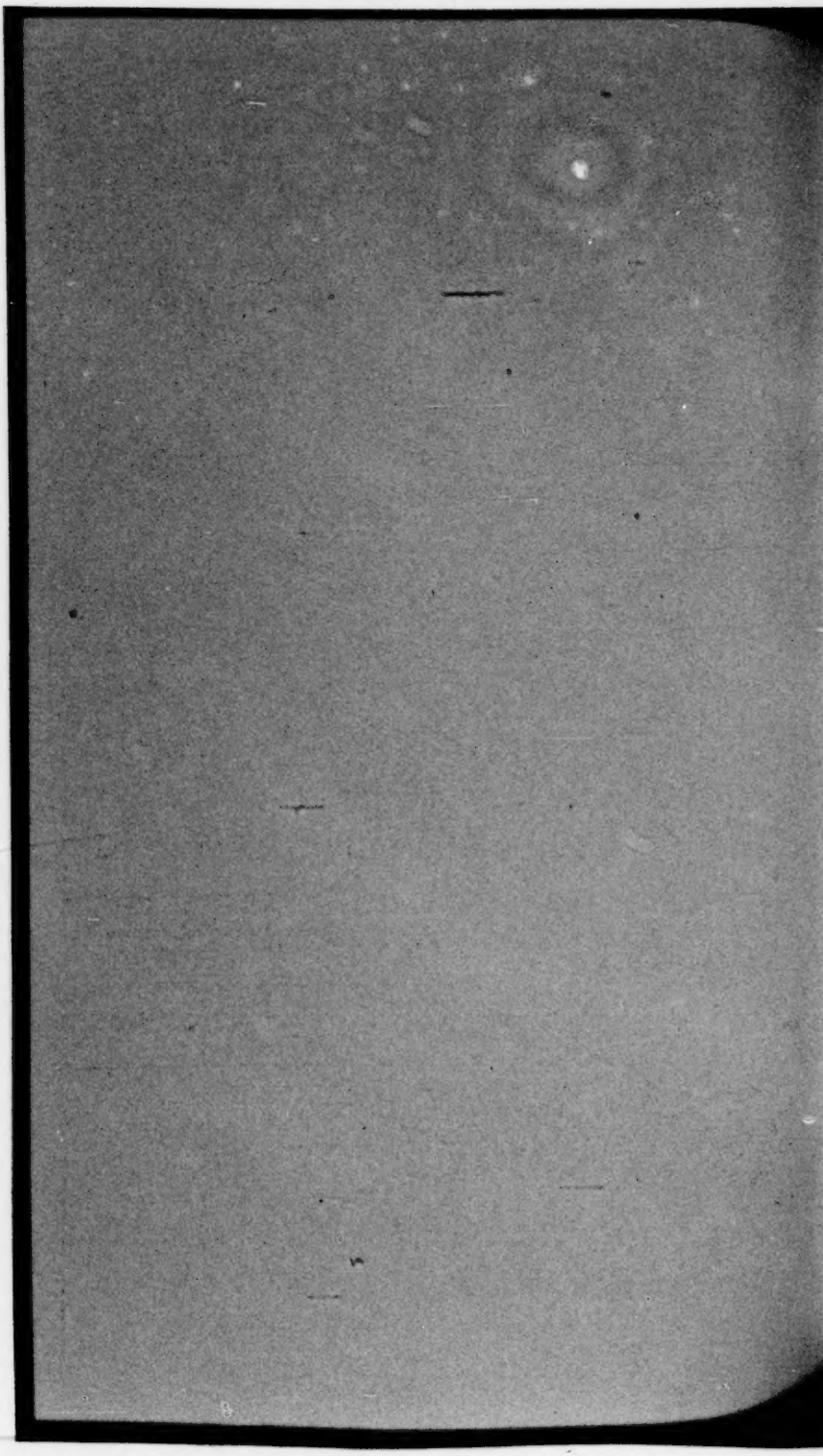

## TABLE OF CONTENTS.


Opinion Below ---- 1

Jurisdiction ---- 1

Statute Involved ---- 2

Questions Presented ---- 3

Statement of Case ---- 3

Argument ---- 6

1. The policy of New York, which is premised upon Section 2218 of the Surrogate's Court Procedure Act, is an unconstitutional interference with the exclusive power of the federal government to conduct the foreign affairs of this country, as held in *Zschernig v. Miller*, 389 U.S. 429 ---- 6

2. The policy of the State of New York, being challenged herein, is contrary to the policy of the Federal Government, which permits the free flow of funds to Romania, and therefore, must yield ---- 11

Conclusion ---- 16


## TABLE OF AUTHORITIES.

### Cases.


*Braier, Matter of*, 305 N.Y. 148, appeal dism'd sub nom., *Kalmane v. Green*, 346 U.S. 802 (1953) ---- 9, 12, 13

*Brizgys v. County Treasurer of Union County*, 84 N.J. Super. 485 ---- 15

*Danisch v. Guardian Life Insurance Company*, 151 F. Supp. 17 ---- 13

*Gorun, et al. v. Fall, et al.*, No. 496, Oct. Term, 1968 decided January 20, 1969, 393 U.S. 398 ..... 11

*Greenberg, In re*, 46 Misc. 2d 883, 261 N.Y.S. 2d 176 (Surr. Ct. 1964) aff'd 24 App. Div. 2d 435 (1st Department 1965) leave to appeal denied, 17 N.Y. 2d 417 (December 30, 1965) ..... 5, 7, 8

*Harmoza, Matter of*, (Surrogate's Court, Nassau County), NYLJ, May 27, 1968, p. 26, col. 1 ..... 9

*Ioannou v. New York*, No. 191, October Term, 1967 ..... 9

*Kolovrat v. Oregon*, 366 U.S. 187 (1961) ..... 12

*Markewitsh, In re the Estate of*, 62 N.J. Super 407 (Passaic Cty. Ct. 1960) ..... 15

*United States v. Pink*, 315 U.S. 203 (1942) ..... 12

*Zadlo, Matter of*, (Surrogate's Court, Westchester County # 10473) ..... 9

*Zschernig v. Miller*, 389 U.S. 429 ..... 4, 6, 9, 10

**Statutes.**

New York Surrogate's Court Procedure Act, Sec. 2218 (former Sec. 269-a) ..... 2, 3, 6, 9, 13, 15, 16

28 U.S.C. 1253 ..... 1

28 U.S.C. 2101(b) ..... 1

28 U.S.C. 2281 ..... 4

**Other.**

31 C.F.R. Section 211.2(a), 25 Federal Regulations, pages 3456, 3526 ..... 5

Murray, James L., Assistant to the Surrogate, New York County paper submitted at "A Symposium Before The Consular Society," entitled "Letters Rogatory," edited by Bernard A. Grossman, and published by Federal Legal Publications, Inc., New York, 1956 ..... 14

# In the Supreme Court of the United States

**OCTOBER TERM, 1968.**

**No. 1146.**

ANGHEL GOLDSTEIN, aka Andrei Pietraru,
IULIU NASTA, aka Julius Nasta and
GHEORGHE FUNDI,
on behalf of themselves and all others similarly situated,
*Appellants,*

vs.

JOSEPH A. COX and SAMUEL DiFALCO,
Surrogates of the County of New York,

EDWARD F. SILVER,
Surrogate of the County of Kings,

CHRISTOPHER C. McGRATH,
Surrogate of the County of Bronx,

JOHN T. CLANCY,
Surrogate of the County of Queens,

ARTHUR LEVITT,
State Comptroller,
*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

## BRIEF OF APPELLANTS.

## OPINION BELOW.

The opinion of the District Court is unreported and appears in the Appendix (p. 33).

## JURISDICTION.

The Order noting Probable Jurisdiction was entered on April 28, 1968. The jurisdiction of this Court to review this decision by direct appeal is conferred by Title 28, U.S.C., §§ 1253 and 2101 (b).

## STATUTE INVOLVED.

Section 269-a of the New York Surrogate's Court Procedure Act was amended and became effective on June 22, 1968, as Section 2218, by the addition of paragraph 1, thereto, after the Motion For Summary Judgment was made. Section 2218 now reads as follows:

> "1. (a) Where it shall appear that an alien legatee, distributee or beneficiary is domiciled or resident within a country to which checks or warrants drawn against funds of the United States may not be transmitted by reason of any executive order, regulation or similar determination of the United States government or any department or agency thereof, the court shall direct that the money or property to which such alien would otherwise be entitled shall be paid into court for the benefit of said alien or the person or persons who thereafter may appear to be entitled thereto. The money or property so paid into court shall be paid out only upon order of the surrogate or pursuant to the order or judgment of a court of competent jurisdiction.
>
> (b) Any assignment of a fund which is required to be deposited pursuant to the provisions of paragraph one (a) of this section shall not be effective to confer upon the assignee any greater right to the delivery of the fund than the assignor would otherwise enjoy.
>
> 2. Where it shall appear that a beneficiary would not have the benefit or use or control of the money or other property due him or where other special circumstances make it desirable that such payment should be withheld the decree may direct that such money or property be paid into court for the benefit of the beneficiary or the person or persons who may thereafter appear entitled thereto. The money or property so paid into court shall be paid out only upon order of the court or pursuant to the order or judgment of a court of competent jurisdiction.

3. In any such proceeding where it is uncertain that an alien beneficiary not residing within the United States, the District of Columbia, The Commonwealth of Puerto Rico or a territory or possession of the United States would have the benefit or use or control of the money or property due him the burden of proving that the alien beneficiary will receive the benefit or use or control of the money or property due him shall be upon him or the person claiming from, through or under him."

## QUESTIONS PRESENTED.

1. Whether Section 2218 of the New York Surrogate's Court Procedure Act, on its face and in application, is unconstitutional because it encroaches upon and impairs the effective exercise of the power to conduct foreign relations and to regulate foreign commerce which is constitutionally vested in the federal government to the exclusion of the State of New York.

2. May New York deprive an alien residing in Romania of his right to property in New York by reason of a policy which is premised upon Section 2218, when such policy is contrary to the established policy of the Federal Government permitting the free flow of funds to Romania?

3. Whether the statutory scheme of Section 2218 results in a deprivation of property contrary to, and violates the equal protection clause of the Fourteenth Amendment?

## STATEMENT OF CASE.

The complaint herein (A. 4) challenges the constitutionality of the New York Surrogate's Procedure Act Section 2218, and the policy of New York predicated on the authority of such statute with regard to the rights of

residents of Romania. The appellants, as victims of such policy whereby funds belonging to them have been and are being withheld from them by the appellees, sought to convene a special tribunal of three judges to pass on the constitutionality of the New York Act and to enjoin its application. Both the District Judge and the Court of Appeals denied the request for a three judge court. On January 15, 1968, this Court, in this case, entered a per curiam order, 389 U. S. 581, whereby it granted certiorari, summarily vacated the judgment of the Court of Appeals, and remanded the case to the Court of Appeals "for further consideration in the light of *Zschernig v. Miller*," 389 U. S. 429. On March 8, 1968, the Court of Appeals entered its order remanding *Goldstein* back to the District Court "for consideration of the constitutional issues by a three judge court pursuant to 28 U. S. C. Section 2281." In view of the decision in *Zschernig*, the appellants moved for summary judgment after issue was joined (A. 10).

Inexplicably, the motion for summary judgment came on for hearing on April 23, 1968, before one District Judge who did nothing at the time except indicate that he would take the matter under advisement. After some confusion, the motion for summary judgment was heard by a three judge court on June 24, 1968, and, on December 20, 1968, said court entered its order denying the motion for summary judgment (A. 41).

It is not disputed that the appellants have been held to be the lawful distributees of New York estates, and that under the laws of New York, they now have and have had, since the time of distribution of the estate, a right to receive the proceeds representing their distributive share. At the time of distribution in each of the estates involving the rights of romanian claimants, the Surrogate decrees the automatic and instanteous withholding of the funds

pon learning that the distributee is a resident and ational of Romania (A. Doc. 18, par. 6, 7, 8).

On March 30, 1960, an agreement relating to financial uestions was concluded at Washington, D. C., between ur government and that of Romania. As a result thereof, omania was removed from the proscribed list of the nited States Treasury Department enumerating countries which federal funds may not be transmitted and, furermore, all federal regulations of a blocking nature egarding Romanian nationals were removed, 31 C. F. R. ection 211.2(a), 25 Federal Regulations, pages 3456, 3526. he present policy of the United States recognizes that here is a reasonable assurance that a payee in Romania ill actually receive a check or warrant drawn against unds of the United States, and will be able to negotiate it r full value. Ever since April of 1960, the United States as been remitting checks and warrants representing ocial security benefits, veterans pensions and other public unds to residents of Romania without any problem or ifficulty as to receipt, and regarding use, benefit and ontrol of the funds by the recipient thereof.

Many of the plaintiffs, who are in dire need of the unds, have been waiting in excess of twenty years for heir money from New York.

Subsequent to the decision of the New York courts n the *Matter of Greenberg*, Motion for Leave To Appeal enied, December 30, 1965, 17 N. Y. 2d, 417, 46 Misc. 2d, 83, 24 App. Div. Rep. 2d, 435, the policy of New York rohibiting the transfer of funds to a resident of Romania as applied with renewed vigor and purpose by the Surroates and authorities of New York (A. Doc. 18, par. 3a, , 6, 7, 8).

Upon consideration of the matter below, the District ourt completely ignored the established policy of the

Federal Government in permitting the free flow of funds to Romania, without in any way commenting about its relevancy to the legal issue before it.

## ARGUMENT.

**1. The policy of New York, which is premised upon Section 2218 of the Surrogate's Court Procedure Act, is an unconstitutional interference with the exclusive power of the federal government to conduct the foreign affairs of this country, as held in *Zschernig v. Miller*, 389 U. S. 429.**

The policy of the State of New York, which petitioners challenge as unconstitutional, is accurately set forth by the appellee Surrogate of King's County in his letter of October 15, 1965, in reply to a request addressed to him by an heir in Romania for the release and immediate payment of his distributive share in the modest amount of $2,989.63. The pertinent portion of said appellee's letter reads as follows:

> "I have given serious consideration to your letter of August 28, 1965, in which you request the release of your distributive share in the above estate. It is the public policy of the State of New York to withhold distribution to legatees who would not have the benefit or use or control of their bequest. The Appellate Courts of this State have held that residents of Rumania are within this description. As a Judge of the Surrogate's Court I am bound by the ruling of the higher court, and as an individual I am in full agreement with it. Accordingly, and despite my personal desire to help you because of your advanced age, physical infirmity and need for the money, I must advise you that if formal application for the payment of your bequest in full is made to me, I would be constrained to deny the same." (A. Doc. 18, par. a,

affidavit in Support of Motion for Summary Judgment.)

A recent and the latest affirmation by the Courts of New York of this policy regarding Romania is to be found in the Surrogate's decision in *In re Greenberg*, 46 Misc. 2d 883, 261 N.Y.S. 2d 176 (Surr. Ct. 1964) aff'd 24 App. Div. 2d 435 (1st Department 1965) leave to appeal denied, 17 N. Y. 2d 417 (December 30, 1965).

It is difficult to comprehend the statement in the opinion of the lower court that "in the case before us there is no showing that New York courts have engaged in the conduct criticized in Zschernig," in the light of the facts set forth in paragraphs 3(a), (b), 4, 5, 6, 7, and 8 of the affidavit in support of the motion for summary judgment (A. Doc. 18). A few excerpts therefrom will readily reveal the fallacy of the court's conclusion. The appellee, Comptroller of the State, stated regularly, as follows:

> "* * * pursuant to a policy recommended by our Attorney General, we are not able to effect payments to residents of certain Eastern European Countries, including Romania because the situation exists which makes it doubtful as to whether the recipients of our checks would receive full value for the dollar amount."
>
> "* * * The Department of Law however has advised us that it will continue its position as to payments to distributees domiciled in Rumania. A recent decision in the Surrogate's Court, New York County (Matter of Greenberg, New York Law Journal, June 16, 1964) upheld the position of the Attorney General of the State."
>
> "* * * the policy of this Department is to withhold any such payments until and when the parties residing within such countries are outside of the jurisdiction of the Soviet Union."

"* * * this Department will not honor any claims from Rumanian nationals at the present time. March 4, 1963."

In addition, the court had before it various decrees of the New York Surrogates which provided for automatic withholding of funds belonging to Romanian distributees "pursuant to Section 269-a of the Surrogate's Court Act (Matter of Greenberg, NYLJ, June 16, 1964, Cox. S.) aff'd App. Div. 1st Dept. NYLJ." Since the decision in *Greenberg*, the funds belonging to a Romanian beneficiary have been and are ordered withheld instantly, on such authority, without according the beneficiary or his legal representative an opportunity to challenge the decree. It has been and still is the unalterable policy of Courts and authorities of New York to withhold funds of Romanian nationals for the sole reason that the beneficiary resides in Romania.

Interestingly enough, the lower court did not find the policy of New York, and, the application of its so-called "Iron Curtain" law, offensive to the Federal Constitution despite the findings and conclusions of the New York courts in the case of *In re Greenberg* (A. Doc. 18, pars. 4, 5, 6, affidavit in support of motion for summary judgment). In that case, both the Surrogate and the Appellate Court premised their conclusions upon the foreign exchange laws of Romania, which they erroneously considered confiscatory and unfair, and upon other internal conditions and circumstances in the country. This, however, was inconsequential to the lower court in its consideration of the foreign affairs aspect of the problem.

Following the decision of this Court in *Zschernig*, undersigned counsel requested payment of the funds belonging to appellant, Iuliu Nasta, from the appellee-state comptroller, Arthur Levitt. In response thereto, said appellee stated:

"Reference is made to your inquiry dated July 31, 1968. Please be advised that there has been no change in the policy of this Department not to transmit any funds to persons residing in Romania or to attorneys-in-fact for such persons. We have been advised that the *Zschernig* case referred to in your letter, does not apply to the situation involved herein and that the *Goldstein* case is now on appeal before the United States Court of Appeals for the Second Circuit. Our policy will continue in effect pending determination of the issues presented in the *Goldstein* case."

In other pending cases, Surrogates have upheld the constitutionality of Section 2218 upon the ground that *Zschernig* did not pass upon or decide the constitutionality of the New York statute, or that *Matter of Braier*, 305 N. Y. 148, appeal dism'd sub nom., *Kalmane v. Green*, 346 U. S. 802 (1953), is still controlling despite *Zschernig*, *Matter of Zadlo* (Surrogate's Court, Westchester County #10473) (*Matter of Harmoza*, Surrogate's Court, Nassau County), NYLJ, May 27, 1968, p. 26, col. 1.

This present attitude on the part of New York is strange, indeed, in view of the representation of the Attorney General of New York to this Court in the case of *Ioannou v. New York*, No. 191, October Term, 1967.

We believe that the conclusions to be drawn from *Zschernig* indicate clearly that statutory restrictions such as contained in the New York law constitute an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and Congress. In this respect, the Court stated:

"* * * Yet, such forbidden state activity * * * has infected *each* of the three provisions of Section 11.070, as applied by Oregon." (Emphasis ours.)

Section 2218 of the New York statute, requiring a showing by the foreign heir that he will have the benefit,

use or control of the funds due him, is identical with one of the three provisions of the Oregon act which was struck down by this Court as an impermissible interference with federal power over foreign affairs. This Court, in *Zschernig*, extended its opinion to the statutes and decisions of California, Montana, New York and Pennsylvania with a view, we believe, to making clear that "the rationale of that decision applies to custodial statutes such as New York as well as to escheat statutes like Oregon's."

That the New York statute cannot be applied effectively without involving the courts in the kind of foreign relations activities proscribed by the Constitution, has been made equally clear by Mr. Justice Stewart, in his concurring opinion in *Zschernig*, in which he was joined by Mr. Justice Brennan, wherein he stated, as follows:

> "I believe that all three of the statutory requirements on their face are contrary to the Constitution of the United States. In my view, *each* of the three provisions of the Oregon law suffers from the same fatal infirmity. *All three launch the State upon a prohibited voyage into a domain of exclusively federal competence.* Any realistic attempt to apply any of the three criteria would necessarily involve the Oregon courts in an evaluation, either expressed or implied, of the administration of foreign law, the credibility of foreign diplomatic statements, and the policies of foreign governments. Of course, state courts must routinely construe foreign law in the resolution of controversies properly before them, but *here the courts of Oregon are thrust into these inquiries only because the Oregon legislature has framed its inheritance laws to the prejudice of nations whose policies it disapproves and thus has trespassed upon an area where the Constitution contemplates that the only National Government shall operate.*" (Emphasis supplied.)

It is readily apparent from the foregoing declaration that the New York statute "suffers from the same fatal infirmity."

**2. The policy of the State of New York, being challenged herein, is contrary to the policy of the Federal Government, which permits the free flow of funds to Romania, and therefore, must yield.**

In the recent appeal to this Court from the decision of a three judge district court in Montana, *Gorun et al. v. Fall, et al.*, No. 496, Oct. Term, 1968 decided January 20, 1969, 393 U. S. 398, Mr. Justice Douglas, in an opinion concurred in by Mr. Justice Black, Mr. Justice Harlan and Mr. Justice Fortas, declared relevant hereto, as follows:

> "Federal Policy permits the free flow of funds to Romania. On March 30, 1960, we entered into an agreement with Romania, by which we agreed to release all blocked assets belonging to Romania. See 25 Fed. Reg. 3458. At the same time, Romania was removed from the list of countries to which the sending of public funds is prohibited. See 25 Fed. Reg. 3526; 31 CFR s s 211.2. *As our opinion in Zschernig makes clear, a state probate judge is not authorized to make or apply a probate rule contrary to that policy.*" (Emphasis supplied.)

That the action of the Federal Government in concluding the Financial Agreement of 1960 with Romania constitutes new foreign policy with relation to that country is clear. In view of this agreement, the Secretary of the Treasury of the United States determined that residents and nationals of Romania would have the use, benefit or control of money transmitted to them from the United States. Agreements entered into by our govern-

ment have the same force and effect and attain the same stature as treaties in the formulation of foreign policy. This foreign policy determination by the Executive Department of the United States overrides any conflicting determination that the courts of New York have made or seek to make pursuant to the policy of the state as set forth in Section 2218. With regard hereto, this Court, in *Kolovrat v. Oregon*, 366 U. S. 187 (1961), declared:

> "* * * state policies as to rights of aliens to inherit must give way under our Constitution's Supremacy Clause to 'overriding' federal treaties and conflicting arrangements."

For "state law must yield when it is inconsistent with, or impairs the policy or provisions of a treaty or of *an international compact or agreement.*" *United States v. Pink*, 315 U. S. 203, 231 (1942). (Italics ours.)

The Court also stated in *Pink*, page 233:

> "No state can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the State; it is vested in the national government exclusively. * * *."

In cases in which funds were withheld from heirs behind the so-called "Iron Curtain," New York relied upon and consistently followed established federal policy whenever the beneficiary was domiciled or resident within a country to which checks or warrants drawn against funds of the United States could not be transmitted. In the leading case on the subject, *Matter of Braier*, 305 N. Y. 148 (1953), appeal dismissed sub. nom. *Kalmane v. Green*, 346 U. S. 802 (1953), the court pointed out that the federal government was in a better position than New York to determine whether or not a resident heir of a New York estate would be likely to receive and have the use, benefit and control of funds sent to him, and as a consequence

thereof, followed the policy of the United States Treasury Department which prohibited the transfer of funds. In *Braier,* the New York Court of Appeals followed the restrictive provision of the Treasury Regulation and concluded therefrom that local conditions in Hungary were such that there was no reasonable assurance that a payee in that country would actually receive the money and have the use and control of same.

In situations wherein New York sought to prohibit the transfer of funds behind the "Iron Curtain," the practice of yielding to federal policy was widespread. The courts in New York had prohibited and prohibit (Section 2218, 1.(a)) the transmittal of funds to heirs behind the Iron Curtain by relying upon established federal policy (U. S. Treasury Department Circular 655) in applying said statute.

To show how widespread and complete was the reliance upon federal policy as established by the Treasury Department, we invite your attention to some additional authoritative statements. In the case of *Danisch v. Guardian Life Insurance Company,* 151 F. Supp. 17, the District Judge in his opinion of April 18, 1957, stated, as follows:

> "The general conditions prevailing in a Communist Country are indeed of such common knowledge as to require no proof of their fundamental antithesis to the public policy prevailing in our own country. Yet in the absence of proof, it is inadvisable for a court to hold, on the basis of judicial notice alone, that the general conditions negate the specific likelihood that these plaintiffs would receive the proceeds of a judgment. There can, of course, be judicial knowledge of specific circumstances sufficient to justify a decision, see In re Weidberg's Estate supra; but as distasteful as the court considers the general conditions in Poland to be, he has no judicial knowl-

edge to justify the specific conclusion that these plai tiffs would not receive payment. However, the vo of judicial knowledge may be filled by the Treasu Regulation precluding the payment of United Stat government funds to persons residing in the Poli People's Republic, because of a finding of a lack reasonable assurance that the payees will actual receive such funds or be able to negotiate checks warrants for full value. *This 'authoritative conclusi reached by the Treasury Department'* was relied up for decision in re Braier's Estate, supra, 305 N. Y. page 157, 111 N. E. 2d at page 428." (Emphasis su plied.)

Some very interesting statements regarding our pro lem were made by James L. Murray, Assistant to the Su rogate, New York County, in a paper which he submitt at "A Symposium Before The Consular Society," entitl "Letters Rogatory," edited by Bernard A. Grossman, a published by Federal Legal Publications, Inc., New Yor 1956. At pp. 46-47, Mr. Murray stated as follows:

"* * * Thus, at the very inception of the estate a ministration the Surrogate invokes the finding of fa of the United States Secretary of the Treasury to t effect that the postal, banking and transportati facilities in certain European countries are such th there is not a reasonable assurance that a payee those countries would have the benefit, use or contr of any property transmitted to him (16 Fed. Re 1818, Treasury Department Circular 1951, 655, Sup 7)."

Here, apparently, is an expert advisor to the Surr gate in New York County who states emphatically th the determination of fact made by the Treasury Depar ment that a resident in certain countries would not ha the benefit, use or control of any property transmitted

him "should be accepted as conclusive unless there is a clear unmistakable proof of a change in our foreign policy based upon a reappraisal of the internal law of Russia since the federal regulation in question was issued."

The New Jersey court in the case of *In re the Estate of Markewitsh*, 62 N. J. Super 407 (Passaic Cty. Ct. 1960), also felt that the Federal Government was the best qualified agency to determine whether the beneficiaries residing in foreign countries would be able to enjoy the use, benefit and control of money forwarded from this country.

In the more recent case of *Brizgys v. County Treasurer of Union County*, 84 N. J. Super. 485, 498-499 (App. Div. 1964), the court stated:

> "it is argued that the funds here are not being transmitted in the manner indicated by the Secretary of the Treasury regulation—that we are concerned with private funds passing through private channels. We find the distinction unimportant. As was said in In Re Wells' Estate, 204 Misc. 975, 126 N. Y. S. 2d 441 (Surr. Ct. 1953), the important factor is whether there is a reasonable assurance that the distributee will actually receive the monies to which it is entitled. And see in Re Markewitsh, 62, N. J. Super., at pages 409, State v. Pakarek, 234 Ore. 74, 378 P. 2d 734, 737-8 (Sup. Ct. 1963)."

It is readily apparent, we believe, that Section 2218 and its predecessor 269-a, of the Surrogate's Court Procedure Act, constitute an attempt on the part of New York to give effect to a politically inspired policy of preventing funds from going to certain Eastern countries of Europe solely because of New York's disapproval of the government and policies of those countries. What logical explanation can there be for New York's refusal to respect and follow the affirmative and overriding policy of the

United States Treasury Department which permits the "free flow of funds to Romania," when, on the other hand, it applies such federal policy, as the "authoritative conclusion of the Treasury Department" in order to prohibit the payment of funds to a party who resides in such a country? This relevant and important question has never been answered by the New York courts, not even the lower court in the instant case, although the issue was squarely before it.

We submit, however, that the only policy, constitutionally correct, that New York may pursue with regard to the rights of an heir residing in Romania, would be one that permits rather than prohibits the "free flow of funds to Romania."

## CONCLUSION.

The decision of the District Court should be reversed, the New York Surrogate's Court Act, Section 2218, declared unconstitutional and that New York be ordered and directed to deliver, without undue delay, all funds which are due and owing and will be due and owing to these plaintiffs and all others similarly situated.

Respectfully submitted,

JOHN R. VINTILLA,

*Attorney for Appellants.*